

FILED & ENTERED

APR 30 2018

CLERK U.S. BANKRUPTCY COURT
Central District of California
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NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

GRAND VIEW FINANCIAL, LLC,

Debtor.

Case No. 2:17-bk-20125-RK

Chapter 11

Adv. No. 2:18-ap-01035-RK

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS' MOTION
TO DISMISS, VACATING HEARING ON
MOTION AND CONTINUING STATUS
CONFERENCE**

GRAND VIEW FINANCIAL, LLC.,

Plaintiff,

vs.

NATIONS DIRECT MORTGAGE, LLC,
et al.,

Defendants.

Vacated Hearing

Date: May 1, 2018

Time: 3:00 p.m.

Courtroom: 1675

Pending before the court in this adversary proceeding is the motion of
Defendants PennyMac Loan Services, LLC, PennyMac Corp., and Mortgage Electronic

1 Registration Systems, Inc., to dismiss the complaint of Plaintiff Grand View Financial,
2 LLC, Debtor, for failure to state a claim upon which relief can be granted pursuant to
3 Federal Rule of Bankruptcy Procedure 7012 and Federal Rule of Civil Procedure
4 12(b)(6). In its complaint, Plaintiff alleged three claims for relief against Defendants for
5 (1) Declaratory Relief; (2) Disallowance of Any Claims of PennyMac Loan Services,
6 LLC; and (3) Violation of Fair Debt Collection Practices Act, which relates to its
7 contention that it has an interest in certain real property located at 124 Illinois Street,
8 Vallejo, California 94590. Lorenzo E. Gasparetti, Christopher O. Rivas and Patil T.
9 Derderian, of the law firm of Reed Smith LLP, represents the moving parties,
10 Defendants PennyMac Loan Services, LLC, PennyMac Corp., and Mortgage Electronic
11 Registrations Services, Inc. Todd M. Arnold, of the law firm of Levene, Neale, Bender,
12 Yoo & Brill L.L.P., represents the responding party, Plaintiff Grand View Financial, LLC,
13 Debtor.

14 Having considered the moving and opposing papers, the court determines that
15 pursuant to Local Bankruptcy Rule 9013-1(j)(3), oral argument on the motion is not
16 necessary, dispenses with oral argument, vacates the hearing on the motion on May 1,
17 2018, takes the motion under submission and rules on the motion on the papers as
18 follows.

19
20 **(1) First Cause of Action - Claim for Declaratory Relief**

21 In its claim for declaratory relief, Plaintiff seeks declaratory relief that Defendant
22 PennyMac Loan Services, LLC, never owned and had title to the original note and
23 original lender deed of trust, that PennyMac Loan Services, LLC, never had standing to
24 issue a Notice of Default, to file a motion for relief from stay, file a reply to such motion
25 for relief from stay, obtain an order for relief from stay and does not have standing to
26 proceed with foreclosure, that the loan was satisfied by insurance proceeds and that
27 none of the Defendants has a lien on the subject real property pursuant to original
28 lender deed of trust.

1 This court granted relief from stay to PennyMac Loan Services, LLC, on January
2 25, 2018 in the main bankruptcy case (Docket Number 169). Since the motion was
3 granted and an order was entered, this court already determined that PennyMac Loan
4 Services, LLC, had standing for purposes of stay relief. Plaintiff did not appeal or ask
5 for reconsideration of this order, which is now final and nonappealable. Plaintiff's claim
6 for declaratory relief as to the stay relief proceedings is an improper collateral attack on
7 the stay relief order, and thus, the claim fails to state a claim upon which relief can be
8 granted. Amendment of the claim as to stay relief proceedings would be futile, so the
9 court does not grant leave to amend as to any claim for declaratory relief as to stay
10 relief.

11 As to Plaintiff's allegations that Defendant PennyMac Loan Services, LLC, does
12 not have an ownership interest in the note because the endorsements and allonges
13 transferring an interest in the note to it were not signed by Monica Lam, the borrower
14 and former owner of the subject property, such allegations are not plausible. There is
15 nothing in the original note that requires the borrower's signature for the lender to
16 assign its interest in the note. See *Yvanova v. New Century Mortgage Corp.*, 62 Cal.4th
17 919, 927 (2016) ("A promissory note is a negotiable instrument the lender may sell
18 without notice to the borrower.") Plaintiff cites no legal authority requiring the borrower's
19 signature for the lender to assign its interest in the note. *Id.* Amendment of the claim as
20 to these allegations would be futile, so the court does not grant leave to amend as to
21 any claim for declaratory relief as to these allegations.

22 As to Plaintiff's allegations that Defendant PennyMac Loan Services, LLC, does
23 not have an ownership interest in the note because the MERS assignment of the
24 original deed of trust did not include an assignment of the original note, i.e., the note
25 and deed of trust are "inseparable". Such allegations are not plausible. The court
26 disagrees with, and rejects, Plaintiff's theory of its claim regarding the "separation" of
27 the promissory note and deed of trust, citing *Carpenter v. Longan*, 83 U.S. 274 (1872).
28 See *In re Copelin*, No. 2:13-bk-32580 RK, Adv. No. 2:14-ap-01250 RK, 2015 WL

222456 (Bankr. C.D. Cal. 2015), *citing*, *In re Preston*, 931 F.Supp.2d 743 (N.D. Tex. 2013). As discussed in these cases, *Copelin* and *Preston*, the separation of the note and deed of trust defense applicable to Colorado territorial law at issue in *Carpenter v. Longan* does not necessarily apply to the law of other states, such as California, where the subject property is situated. Plaintiff cites no legal authority that this defense applies in California law. The authority is to the contrary. *In re Copelin*, No. 2:13-bk-32580 RK, Adv. No. 2:14-ap-01250 RK, 2015 WL 222456, slip op. at *2, *citing*, California Civil Code § 2924 *et seq.*, *Debrunner v. Deutsche Bank National Trust Co.*, 204 Cal.App.4th 433, 439-442 (2012); *In re Rivera*, 2014 WL 66775693 (9th Cir. BAP 2014), slip op. at *7; *see also*, *Heflebower v. JPMorgan Chase Bank, N.A.*, No. 1:12-CV-01671 AWI, 2013 WL 5476806 (E.D. Cal. 2013), slip op. at *9 (“California is a non-judicial foreclosure state and requires neither possession nor production of the original notice in order to initiate non-judicial foreclosure proceedings under a deed of trust.”).

Amendment of the claim as to these allegations would be futile, so the court does not grant leave to amend as to any claim for declaratory relief as to these allegations.

As to Plaintiff’s allegations that the loan was satisfied by insurance proceeds, such allegations are not plausible. The assertion that the loan numbers are different is not a plausible factual basis for such claim, which the court determines fails to state a claim upon which relief can be granted. It seems to the court that a different company holding the loan can administratively assign a different account number to the loan, and it cannot be reasonably implied from that administrative change that insurance proceeds paid off the loan. However, the court will grant leave to amend at least once to allege a plausible claim for declaratory relief as to alleged loan satisfaction, which must have a reasonable basis in fact and law pursuant to Federal Rule of Bankruptcy Procedure 9011. *See National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041-1042 (9th Cir. 2015)(citations omitted).

As to Plaintiff’s allegations that Defendants do not have a lien on the subject property and whether they may properly foreclose a lien on the subject property, Plaintiff

1 seeks a determination that the lien of Defendants do not attach to the subject property,
2 which it contends is property of the bankruptcy estate under 11 U.S.C. § 541. Plaintiff
3 alleges that it owns the subject property based on a transfer from the prior owner,
4 Monica Lam, the borrower on the loan evidenced by the note and the deed of trust. The
5 factual allegations that as indicated in a letter dated February 2, 2017 to Monica Lam,
6 the borrower and the former owner of the subject property (Exhibit 7 to Complaint),
7 Defendant PennyMac Loan Services, LLC, sold the loan to Mass Mutual Life Insurance
8 Co. indicate a claim upon which relief can be granted that Defendants do not have a lien
9 on the subject property, and the motion as to such claim should be denied. See 2
10 O'Connell, Stevenson and Phillips, *Rutter Group Practice Guide: Federal Civil*
11 *Procedure Before Trial, California and Ninth Circuit Edition*, ¶¶ 9:213 and 9:215 at 9-84
12 – 9-85 (2018)(complaint is to be construed in light most favorable to plaintiff, and
13 material factual allegations are assumed to be true), *citing inter alia*, *Bell Atlantic Corp.*
14 *v. Twombly*, 550 U.S. 544, 556 (2007) and *Doe v. United States*, 419 F.3d 1058, 1062
15 (9th Cir. 2005). However, having said this, such allegations do not by themselves stop
16 Defendants from proceeding with a nonjudicial foreclosure (e.g., as assignee of the
17 deed of trust under California law, *Debrunner v. Deutsche Bank National Trust Co.*,
18 *supra*) if they have a right to do so since stay relief was granted. In granting stay relief,
19 the court only determines that the movant had a colorable claim to enforce a right
20 against property of the bankruptcy estate and does not determine the merits of any such
21 claim. See, e.g., *In re Griffin*, 719 F.3d 1126, 1128 (9th Cir. 2013)(citations omitted).

22
23 **(2) Second Cause of Action - Claim for Disallowance of Any Claims of**
24 **PennyMac Loan Services, LLC per § 502(b)**

25 PennyMac Loan Services, LLC, filed a proof of claim in this bankruptcy case
26 (Claim Number 5). The proof of claim asserted a secured claim in the amount of
27 \$310,989.72 for “Money Loaned.” Defendants contend that Plaintiff fails to state a claim
28 upon which relief can be granted as for the first cause of action for declaratory relief, but

1 the factual allegations for the first cause of action that indicate a claim upon which relief
2 can be granted that Defendants do not have a secured claim against the estate (i.e., the
3 allegations that Defendants sold the note to a third party, Mass Mutual), and the motion
4 as to such claim should be denied.

5 Defendants also contend that Plaintiff must litigate this claim through the claims
6 disallowance process under Federal Rule of Bankruptcy Procedure 3007. Federal Rule
7 of Bankruptcy Procedure 3007(b) states in pertinent part: “A party in interest shall not
8 include a demand for relief of a kind specified in Rule 7001 in an objection to the
9 allowance of a claim, but may include the objection in an adversary proceeding.”

10 Accordingly, Plaintiff may properly assert a claim for disallowance of the filed
11 proof of claim of PennyMac Loan Services, LLC, through this adversary proceeding,
12 and thus, the motion as to this claim should be denied.

13
14 **(3) Third Cause of Action - Claim for Violation of Fair Debt Collection
Practices Act (FDCPA) Pursuant to 15 U.S.C. §§ 1692 et seq.**

15
16 Plaintiff alleges in the complaint that “PennyMac LLC (a) took non-judicial action
17 to effect the dispossession or disablement of the Property by issuing or causing to be
18 issued the Notice of Default and (b) will take non-judicial action to effect the
19 dispossession or disablement of the Property by proceeding with any efforts to
20 effectuate a Foreclosure of the Property pursuant to a Foreclosure Sale thereof and, in
21 the event PennyMac LLC conducts a Foreclosure Sale, by effectuating any Transfer the
22 Property to the winning bidder at the Foreclosure Sale (collectively, the ‘Conduct’).”
23 Complaint, ¶ 73. Plaintiff alleges that this conduct violated 15 U.S.C. § 1692f(6) and it
24 is entitled to damages under 15 U.S.C. § 1692k(a). Complaint, ¶¶ 75 and 76.

25 Defendants argue that their actions in a nonjudicial foreclosure on the subject
26 property is not “debt collection” within the meaning of the FDCPA, citing inter alia,
27 *Izenberg v. ETS Services, LLC*, 589 F.Supp.2d 1193, 1199 (C.D. Cal. 2008), which
28 stated that foreclosing on a property pursuant to a deed of trust is not the collection of

1 debt within the meaning of FDCPA. “To be held liable for violation of the FDCPA, a
2 defendant must—as a threshold requirement—fall within the Act’s definition of ‘debt
3 collector.’” *Id.* at 1198, *citing, Heintz v. Jenkins*, 514 U.S. 291, 294, 115 S.Ct. 1489, 131
4 L.Ed.2d 395 (1995) and *Romine v. Diversified Collection Services*, 155 F.3d 1142, 1146
5 (9th Cir.1998). The FDCPA defines “debt collector,” in pertinent part, as follows: “any
6 person who uses any instrumentality of interstate commerce or the mails in any
7 business the principal purpose of which is the collection of any debts, or who regularly
8 collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be
9 owed or due another.” 15 U.S.C. § 1692a(6). “Thus, a ‘debt collector’ under the
10 FDCPA is either (1) ‘a person’ the ‘principal purpose’ of whose business is the collection
11 of debts (whether on behalf of himself or others); or (2) ‘a person’ who ‘regularly’
12 collects debts on behalf of others (whether or not it is the principal purpose of his
13 business).” *Izenberg v. ETS Services, LLC*, 589 F.Supp.2d at 1199. “To state a claim
14 for violation of the FDCPA, a plaintiff must allege that the defendant is a ‘debt collector’
15 collecting a ‘debt.’” *Id.* at 1199, quoting *Ines v. Countrywide Home Loans*, No.
16 08cv1267 WQH (NLS), 2008 WL 4791863, *2 (S.D.Cal. 2008).

17 “Foreclosing on a trust deed is distinct from the collection of the obligation to pay
18 money. The FDCPA is intended to curtail objectionable acts occurring in the process of
19 collecting funds from a debtor. But, foreclosing on a trust deed is an entirely different
20 path. Payment of funds is not the object of the foreclosure action. Rather, the lender is
21 foreclosing its interest in the property.” *Hulse v. Ocwen Federal Bank, FSB*, 195
22 F.Supp.2d 1188, 1204 (D. Ore. 2002), *cited with approval in. Vien-Phuong Thi Ho v.*
23 *ReconTrust Co., NA*, 858 F.3d 568, 572-573 (9th Cir. 2017).

24 The Ninth Circuit has held that the enforcement of a security interest is not
25 always debt collection within the meaning of the FDCPA. *Vien-Phuong Thi Ho v.*
26 *ReconTrust Co., NA*, 858 F.3d at 573. An entity does not become a “debt collector”
27 within the meaning of FDCPA if its only role in the debt collection process is the
28 enforcement of a security interest. *Id.* In *Vien-Phuong Thi Ho*, the communications

1 were limited to the foreclosure process and did not request payment. *Id.* at 574. The
2 communications merely informed the debtor that the foreclosure process began,
3 explained the foreclosure timeline, appraised her of her rights and stated should could
4 contact Countrywide if she wished to make a payment. *Id.* These communications
5 were entirely different form the harassing communications that the FDCPA was meant
6 to prevent. *Id.* The enforcement of a security interest often creates an incentive to pay
7 the underlying debt. *Id.* “If this were sufficient to transform the enforcement of security
8 interest into debt collection, then all the security enforcers would be debt collectors. This
9 would render meaningless the FDCPA's carefully drawn distinction between debt
10 collectors and enforcers of security interests, and expand the scope of the FDCPA well
11 past the boundary of clear congressional intent and common sense.” *Id.*

12 Plaintiff cites to the Ninth Circuit’s opinion in *Dowers v. Nationstar Mortgage,*
13 *LLC*, 852 F.3d 964 (9th Cir. 2017) wherein the Ninth Circuit referred its earlier decision
14 in *Ho v. ReconTrust Co., NA*, 840 F.3d 618 (9th Cir. 2016) as instructive as to a party
15 enforcing a security interest being a debt collector for purposes of 15 U.S.C. § 1692f(6).
16 *Id.* at 971. However, as held in *Dowers*, alleged conduct to enforce a security interest
17 may be actionable under 15 U.S.C. § 1692f(6) if “there is no present right to possession
18 of the property claimed as collateral through an enforceable security interest.” *Dowers*
19 *v. Nationstar Mortgage, LLC*, 852 F.3d at 971. Liberally construing the claim, Plaintiff
20 apparently alleges that Defendants did not have the present right to possession of the
21 property because their ownership and authority to act is in question. Here, the notice of
22 default to the borrower and former owner, Ms. Lam, was dated in 2016 before the
23 assignment of the deed of trust in 2017 to Defendant PennyMac Loan Services, LLC,
24 and the allonges transferring the interest in the note to this defendant are undated.
25 Defendants belatedly in their reply produce a copy of a letter to the borrower and former
26 owner, Ms. Lam, dated in 2015 before the notice of default indicating that the holder of
27 the note designated PennyMac Loan Services, LLC, as the servicer on the loan, which
28 may indicate that it had authority to issue the notice of default.

1 The complaint in this case alleges that the only acts by Defendants in violation of
2 the FDCPA are the issuance of the notice of default to the borrower and former owner,
3 Monica Lam, and future acts to enforce their security interest against the subject real
4 property through nonjudicial foreclosure. Such allegations fail to state a claim upon
5 which relief can be granted under the FDCPA that Plaintiff may assert as to the notice of
6 default because Plaintiff lacks standing to complain of the notice of default as a violation
7 of the FDCPA since it was not directed to it, but to Ms. Lam. Moreover, as to future acts
8 to enforce the security interest, such allegations fail to state a claim upon which relief
9 can be granted under the FDCPA because these acts which may violate the FDCPA
10 have not occurred, so there is no violation. Besides, if Defendants only undertake acts
11 to enforce the security interest, such acts may not be the type of debt collection that
12 FDCPA was designed to prevent as held in *Vien-Phuong Thi Ho v. ReconTrust Co.,*
13 *NA., supra.* However, the court will grant leave to amend at least once to allege a
14 plausible claim under the FDCPA, which must have a reasonable basis in fact and law
15 pursuant to Federal Rule of Bankruptcy Procedure 9011. *See National Council of La*
16 *Raza v. Cegavske*, 800 F.3d at 1041-1042(citations omitted).

17 For the foregoing reasons, the court grants in part and denies in part the motion
18 as follows:

19 The motion as to the first cause of action for declaratory relief as to the stay relief
20 proceedings is granted, and the claim is dismissed for failure to state a claim upon
21 which relief can be granted with prejudice.

22 The motion as to the first cause of action for declaratory relief on grounds that
23 Defendant PennyMac Loan Services, LLC, does not have an ownership interest in the
24 note because the endorsements and allonges transferring an interest in the note to it
25 were not signed by Monica Lam, the borrower and former owner of the subject property
26 is granted, and the claim is dismissed for failure to state a claim upon which relief can
27 be granted with prejudice.

28 The motion as to the first cause of action for declaratory relief on grounds that

1 Defendant PennyMac Loan Services, LLC, does not have an ownership interest in the
2 note because the MERS assignment of the original deed of trust did not include an
3 assignment of the original note is granted, and the claim is dismissed for failure to state
4 a claim upon which relief can be granted with prejudice.

5 The motion as to the first cause of action for declaratory relief as to the alleged
6 loan satisfaction is granted, and the claim is dismissed for failure to state a claim upon
7 which relief can be granted with leave to amend within 30 days of entry of this order.

8 The motion as to the first cause of action for declaratory relief as to avoidance of
9 Defendants' alleged lien on the subject property is denied, and Defendants must serve
10 an answer to this claim within 14 days of the date of entry of this order. (The court
11 recognizes that Plaintiff may serve an amended complaint, which would supersede the
12 original complaint and any answer thereto. However, Plaintiff may choose not to amend
13 its complaint by letting the 30-day leave period lapse, and the case will be at issue.)

14 The motion as to the second cause of action for claim disallowance declaratory
15 relief as to avoidance of Defendants' alleged lien on the subject property is denied, and
16 Defendants must serve an answer to this claim within 14 days of the date of entry of this
17 order.

18 The motion as to the third cause of action under the FDCPA, and the claim is
19 dismissed for failure to state a claim upon which relief can be granted with leave to
20 amend within 30 days of entry of this order.

21 The hearing on the motion noticed for May 1, 2018 at 3:00 p.m. is vacated. No
22 appearances are required on May 1, 2018.

23 ///

24 ///

1 In light of the court's rulings in this order, the court on its own motion continues
2 the status conference set for June 5, 2018 at 1:30 p.m. to July 17, 2018 at 1:30 p.m.
3 and extends the deadline for filing a joint status report to July 10, 2018.

4 IT IS SO ORDERED.

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25 Date: April 30, 2018



Robert Kwan
United States Bankruptcy Judge